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DEPARTMENT OF NATURAL RESOURCES

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March 25, 2009

Outgoing

0070047

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Mr. Harold Shepherd, Executive Director
Center for Water Advocacy
P. O. Box 331
90 West Center St.
Moab, Utah 84532

Subject: Correction of the Division's Decision Document Regarding Petition for Unsuitability Mailed on March 23, 2009, Kinney #2 Mine, C/007/0047, Outgoing File

Dear Mr. Shepherd:

On March 23, 2009 the Division sent you a decision regarding your recent petition for unsuitability for the area encompassed by the Kinney Coal Mine application. Unfortunately we have discovered that our decision document did not get copied correctly and is missing one of its pages. We have enclosed another copy of the decision document, which we now trust is complete. We apologize for any confusion that this may have caused.

If you have any questions please contact me at (801) 538-5325.

Sincerely,

Daron R. Haddock
Permit Supervisor

DRH/sqs
Enclosure

cc: Steve Alder
Daron Haddock
Greg Hunt, Agent Carbon Resources, LLC
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Decision on Petition to Designate Lands as Unsuitable for Surface Coal Mining Operations in the Kinney #2 Mine Area

March 16, 2009

Introduction

On December 1, 2008, The Center for Water Advocacy, (CWA) on behalf of its members who live in the town of Schofield, Utah, filed a petition to have the Kinney #2 Mine area including Sections 32 and 33 of Township 12 South, Range 7 East determined as lands unsuitable for coal mining, pursuant to Utah Admin. Code R645-103. The Division determined the petition incomplete and returned it January 12, 2009. CWA resubmitted the petition on March 2, 2009. The Division has reviewed the petition and attachments and for the reasons described below has found the petition is still incomplete in part. In addition, the Division has determined that it will not consider the part of the petition pertaining to the lands within the complete permit application.

Background

The authority to develop a petition process for designating lands unsuitable for surface coal mining is found in Section 40-10-24 of the Utah Code or the Utah Coal Mining and Reclamation Act (UCMRA). The rules at R645-103-300 and 400 have been adopted to provide procedures and describe the criteria for evaluation of a petition for the designation of nonfederal and non-Indian area as unsuitable for coal mining and reclamation operations.

The Division received a Minor Coal Exploration application from Carbon Resources, LLC for an area within and adjacent to the petition area on August 17, 2005. The initial Mining and Reclamation Plan (MRP) to conduct coal mining and reclamation operations for the Kinney No. 2 Mine was received February 19, 2008. The MRP was determined administratively complete on June 24, 2008. Public notice of the complete application was published June 24, July 1, 8, and 15, 2008. At the request of CWA an informal conference was held September 30, 2008. At the time of the request for an informal conference (August 18, 2008) CWA also requested that the lands proposed for mining be determined unsuitable for coal mining. A Petition for a determination of unsuitability was not filed.

The proposed Kinney No. 2 Mine is an underground coal mine located one half mile north of Scofield, Utah and east of Utah State Highway 96. The Kinney Mine permit area covers an area of approximately 448 acres and occupies a large portion of T12S R7E Sec 33 but only a small portion of Sec. 32. The surface facilities will be located on 27 acres located in the northeast quarter of the southeast quarter of Section 33. Surface facilities and the proposed disturbed area are proposed to be located at the site of past mining, primarily on lands previously disturbed and abandoned by coal mining operations. In 1985, the Utah Abandoned Mine Reclamation program (AML) reclaimed this area to its present configuration. The permit area lands are owned by various private entities, including Carbon Resources LLC and the Evangelos George Telonis Trust, administered by Nick Sampinos. Carbon County, Carbon Resources LLC, US Government, Hilda Hammond, Pit-Min, Inc., and Peabody Natural Resources own the coal.

Current anticipated coal production is 800,000 tons annually utilizing continuous mining methods.

As indicated above, the Division received an unsigned and incomplete petition from CWA (petitioners) on December 1, 2008 and the revised petition on March 2, 2009. The petitioners state that they are seeking a determination of unsuitability in "relation to the Kinney Coal Mine Application Mining and Reclamation Permit Application – Kinney Mine" including Sections 32 and 33 of Township 12 South, Range 7 East. No map was received with the re-submitted petition.

Petitioners allege that Sections 32 and 33 are unsuitable for coal mining and reclamation operations based on the following claims:

- The mine is incompatible with existing state or local land use plans. No existing state or local land use plans were identified or submitted, rather the petitioners alleged concerns that include: trophy fishing at Scofield Reservoir; freightliner trucks presenting a traffic hazard; and truck traffic interfering with visitors and community enjoyment of the reservoir.
- The mine will affect fragile or historic lands. No lands or buildings identified as historic or fragile were identified. But the petitioners allege that tourism will be impacted by the "noise, visual, and water pollution resulting from the mine; and the human health impacts of coal mining near residential and commercial buildings and activity."
- The mine will affect renewable resource lands. The petitioners do not identify the location of the renewable resource lands as defined by the Act, but allege that the mine is located next to Mud Creek with a valuable fishery, and that the type of mining planned is potentially detrimental to water quality in the Creek.
- Natural hazard lands will be affected. The petitioners fail to identify the natural hazard lands as defined by the Act, but allege concerns that the mine is located within the city limits and will have human health impacts of coal mining near residential and commercial buildings.

The petition has four attachments as supporting evidence.

- 1) The first attachment contains 11 pages of deficiencies prepared by CWA discussing why the MRP does not comply with the UCMRA.
- 2) Attachment 2 describes the potential coal resources of the petition area. This attachment is page 1.0-2 of the MRP.
- 3) Attachment 3 is an inspection report conducted by the Division for the Skyline Mine dated August 13, 2008, detailing an enforcement action for "three separate releases of coal laden sediment" into Eccles Creek.
- 4) The last, Attachment 4, includes two papers titled Relations Between Health Indicators and Residential Proximity to Coal Mining in West Virginia regarding the human health effects of residents located near active coal mines and The Mortality from Heart, Respiratory, and Kidney Disease in Coal Mining Areas of Appalachia, authored by Michael Hendrix and published in the American Journal of Public Health (2008) and the International Archives of Occupational and Environmental Health (2008), respectively. These reports support the claim of human health hazards on the environment.

Analyses & Determinations

Petitioners have asked that the all of Sections 32 and 33 be deemed unsuitable for coal mining and reclamation operations. As noted above, an application for coal mining or the MRP for the Kenny No. 2 mine was determined complete on June 25, 2008 and notice of the complete application was published on June 24, July 1, 8, and 15, 2008. The UCMRA and implementing rules provide that the Division may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice published. A determination of completeness of an application infers that the coal permit applicant has taken substantial legal and financial steps in the permitting process. OSM noted in the preamble (48 FR 41312, pg. 46) discussing the Federal Regulations for the petition process on September 14, 1983, that this provision:

"will prevent the administrative processing of petitions from being used to impede surface mining operations on lands for which petitioners could earlier have filed petitions. It does not take away the right for citizen participation, but does set limits on the effects the timing of a petition filing has on a permit application. The petition process is more a general land-use planning tool than it is a means to make site specific decisions. ...Petitioners should be looking ahead to identifying areas that should not be mined, not reacting on a site-by-site basis. The House Committee Report No. 95-218 (1977) on page 95 states, "It should be noted that the designation process is structured to be applied on an area basis, rather than a site-by-site determination which presents issues more appropriately addressed in the permit application process." This new rule does not mean, however, that important issues will not be considered or that the public will be excluded in the consideration of permits. The permit review process includes means for citizen input and for consideration of important issues. "

So although the state can deny the petition it doesn't preclude public input, including the petitioners, in the coal permitting process.

The Division has determined to exercise its discretion to not process the petition with regard to the lands within the Kinney No. 2 Mine permit area (Map 4.5.1.2-2 of the MRP) (R645-103-431.600). Notice of administrative completeness had been given prior to the earliest possible request made in the letter requesting an informal conference submitted on August 18, 2008. This letter did not satisfy the requirements for a petition. The notice of completeness occurred more than 4 months prior to receipt of the first unsigned and incomplete petition and more than 6 months prior to receipt of the current signed but still incomplete petition filed March 2, 2009. As set forth below the current petition is still incomplete and in addition fails to address the required unsuitability criteria with specificity and data to support the request. Meanwhile the mine application has been determined complete and the operator is entitled and the Division required to processing according to statutory time constraints. In addition, the petition in large part does not focus on the unsuitability of the lands but rather objects to the proposed mining and reclamation permit and possible impacts. The petitioners' objections to the proposed mining operation are more directly addressed within the permit approval process. This discretion to not process a petition for unsuitability for land within an existing complete application is provided in

order to protect operators who have invested significant time and expenses in the permitting process. This finding does not preclude opportunities for the petitioners to provide input on the Kinney No. 2 Mine during the on-going permitting and environmental reviews.

As to the remaining lands, a petition of unsuitability must be complete and provide the information required under R645-103-422. A topographic map showing the location and size of the area encompassed by the designated petition was not provided in the petition as required by R645-103-422.500, although it is clear the petition designates the entire Sections of 32 and 33. .

The allegations of fact and supporting evidence must cover the entire petitioned area (R645-103-422.700). The map must correspond to the areas sought to be found unsuitable not just identify where the lands are generally. If you elect to re-file the petition you should be aware in revising the allegations and preparing the map that a petition may be considered frivolous if the lands do not contain mineable coal. Also the lands must be subject to surface impacts from underground mining which for the purposes of the Unsuitability determination do not include subsidence. The preamble to the federal rules states that a petition will be considered "frivolous" if it includes land that do not contain mineable coal or lands which would be subject to surface impacts from underground mines (subsidence is not considered a surface impact). So when or if the petition with a map is resubmitted the petition should be revised to exclude these lands

In addition, the Petition must take into account the mitigation requirements of the Act. In the preamble to the federal counter part to this regulation OSM requires that:

The petitioner assume contemporary mining practices required under the applicable regulatory program will be followed. That is, any mine would have to meet the requirements of the Act; a petitioner may not assume mining impacts that would be prevented by the environmental protection requirements mandated by the Act. Any petition based upon such preventable impacts would have no merit.

Attachment 1, 3, and 4 of the petition does not assume or consider that the MRP contains the prerequisite technical information and that the mining operation will be conducted as required by the UCMRA and applicable environmental regulations.

The petition is also incomplete since it does not explain how each allegation is related to the petitioners' interest and to which type of mining operation as required by R645-103-422.700. The petitioner should describe how Attachment 4 specifically relates: 1) to this petition area; 2) the types of surface coal mining operations; and 3) given that all environmental requirements will be followed. This correlation must be described in the petition to support the allegations. Specific existing and federal statutes address many of these issues, such as laws governing air and water quality. The Division must assume that any permit issued will comply with these laws.

In summary, the Division finds the petition will not be considered in part and returned in part for the following reasons.

- The lands under petition within the Kinney No. 2 Mine permit area (Map 4.5.1.2-2 of the MRP) are exempt for designation under the petition process (R645-103-431.600). The rules allow the Division this discretion if the area under petition has been determined

administratively complete and the first newspaper notice published.

- The petition is incomplete because a topographic map showing the location and size of the petitioned area is not included in the petition.
- The petition is incomplete because it does not explain how each allegation is related to the petitioners interest and the type of mining operation to be conducted.

Petitioners are welcome to submit their petition again, with the supporting evidence noted above to deem the petition complete with respect to their allegations, and with evidence that supports the scope of the lands requested. However the Division will not consider lands within the Kinney No. 2 permit area in the petition for which a complete administratively complete permit application has been filed.

In accordance with Utah Code Ann. R645-103 and the Utah Administrative Procedures Act 63G-4-301, petitioners may within thirty (30) days of receipt of this letter and findings, make a written appeal of this decision to the Board of Oil, Gas and Mining. To do so, you must file the written request stating the grounds for review and the relief requested.

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